Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1888

EDWARD W. MAHER, COMMISSIONER OF
INCOME MAINTENANCE,
STATE OF CONNECTICUT,

Petitioner,

v.

VIRGINIA GAGNE, INDIVIDUALLY AND
ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Edward W. Maher, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 9, 1979.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported. A copy of the slip opinion appears in the Appendix hereto. The opinion of the District Court for the District of Connecticut is reported at 455 F. Supp. 1344.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 9, 1979, and the petitioner was granted an extension of time to June 22, 1979 in which to file this petition. This petition for certiorari was filed within the required time as extended. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, in an action combining a constitutional claim under 42 U.S.C. §1983 with a statutory claim under the Social Security Act, which is subsequently settled by entry of a consent decree, and the merits of the §1983 claim are never determined, an award of attorney's fees against the Connecticut Commissioner of Income Maintenance, in his official capacity, to be paid out of State funds, is authorized by the Civil Rights Attorney's Fees Awards Act of 1976.

2. Whether, as the Court of Appeals has alternatively ruled, the award of the attorney's fees against the State of Connecticut in this action was permissible as an "ancillary effect" under *Edelman v. Jordan*, 415 U.S. 651 (1974), and therefore not barred by the Eleventh Amendment.

STATUTES INVOLVED

United States Code, Title 42:

§602

(a) A State plan for aid and services to needy families

with children must . . . (7) except as may otherwise be provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;

§1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§1988

In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

STATEMENT OF THE CASE

The plaintiff, a working recipient of public assistance under Connecticut's program of aid to Families with Dependent Children (AFDC), brought an action in the United States

District Court against the Commissioner of Social Services (now called Commissioner of Income Maintenance) in which she alleged that the petitioner's policies and practices governing the exemption from income of work-related expenses were in conflict with §402(a)(7) of the Social Security Act, 42 U.S.C. §602(a)(7). She also claimed that the Department's practices and policies violated the due process and equal protection clauses of the Fourteenth Amendment, and that this action was authorized under 42 U.S.C. §1983.

The plaintiff's constitutional claims were listed by the district court as:

> "whether an impermissible distinction had been created between those working welfare recipients whose work-related expenses were fully considered in the computation of AFDC awards and those whose work-related expenses were not fully considered, in violation of the equal protection clause; whether the defendant, by creating a table of standard allowances, which could not be challenged in individual cases, set up an irrebuttable presumption with respect to work-related expenses, in violation of the due process clause; and whether the failure to provide written notice of the opportunity for an evidentiary hearing, if the welfare recipient disputed the defendant's calculation of work-related expenses, violated the due process clause." Appendix, p. 9a.

While the case was pending, the Commissioner amended his regulations to provide expressly for deduction of all reasonable work-related expenses. Thereafter, plaintiff amended her complaint alleging that the new policy as implemented still resulted in routine disallowance of expenses in excess of the standard allowances, and that the State had not adopted reasonable procedures to notify AFDC recipients of their right to work-related expenses. Appendix, p. 3a.

The parties subsequently negotiated a settlement of the case, and a consent judgment, which provided, *inter alia*, that the action would be certified as a class action, was entered by the district court. Appendix, p. 21a.

Thereafter, the plaintiff's attorneys moved for an award of attorney's fees against the petitioner, in his official capacity as Commissioner of Social Services, pursuant to the Civil Rights Attorney's Fees Award Act of 1976 (Fees Act). The district court subsequently awarded plaintiff's attorneys a fee of $3,012.19 to be paid out of State funds (*Appendix*, p. 2a) and, on appeal, the Court of Appeals affirmed the district court's award.

The petitioner argued before the Court of appeals, *inter alia*, that the Fees Act is not applicable to a case such as this one since none of the plaintiff's "civil rights" (as that term is commonly understood) had been violated, R- , *Brief of Appellant*. pp. 16, 29; that under the language of the Fees Act an award of attorney's fees is authorized only if the plaintiff is "the prevailing party" on her *constitutional* claim, because the Fees Act does not authorize fees for successful claims under the Social Security Act, *Appendix*, p. 5a; and that Congress did not intend to authorize an award of fees in a case where a plaintiff combines a constitutional claim with a statutory claim and the case is thereafter settled without a judicial determination on the merits of the constitutional claim. *Id.*

The petitioner also argued that the plaintiff could not be considered "the prevailing party" under the Fees Act since she was unsuccessful in an administrative fair hearing she had requested to contest the State's disallowance of the same work-related expenses she was contesting in this action. *Appendix*, p. 13a n. 7.

The petitioner further argued that, in any event, the Eleventh Amendment was a bar to the award of fees against the State because the power of Congress to abrogate a State's

sovereign immunity when acting pursuant to §5 of the Fourteenth Amendment extends only to suits in which a party prevails on a constitutional claim. *Appendix*, p. 12a.

The Court of appeals rejected these arguments and affirmed the district court's award of attorney's fees; and remanded on the plaintiff-appellee's cross-appeal.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW APPEARS TO CONFLICT WITH THIS COURT'S DECISION IN *EDELMAN V. JORDAN*.

In *Edelman v. Jordan*, 415 U.S.651 (1974) this court held that retroactive welfare benefits awarded to plaintiffs by a federal district court by reason of a wrongful denial of benefits by Illinois officials prior to the entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment. The Court stated, therein, *inter alia*, that "[T]hough a §1983 action may be instituted by public aid recipients . . . a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury . . . " 415 U.S., at 676-677.

The Court of appeals has held in this case that, "although the Eleventh Amendment generally bars federal court awards of compensatory relief to be paid from a State treasury . . . there are at least two exceptions . . . relevant here," to wit:

> 1) that the award of attorneys' fees in this case was a permitted "ancillary effect" of a proper prospective decree and therefore not barred by the Eleventh Amendment, Appendix, p. 11a; and
>
> 2) ". . . that it is within Congress' Fourteenth Amendment power to authorize a fee award when a party prevails [under the Fees Act] as long as the pendent constitutional claim is a substantial one and arises out of the same operative facts." *Appendix*, p. 12a.

Petitioner submits that neither the above "exceptions" supports the award of fees against the State in this action. First, because the award of attorney's fees against the State made by the district court does not fit within this Court's careful definition in *Edelman* of an "ancillary effect" since the award of fees in this case is not "the necessary result of compliance with decrees which by their terms were prospective in nature," 415 U.S. 668; and, secondly, if a party "prevails", under the Fees Act, on a *statutory* claim (in this case the Social Security Act) the Fees Act does *not* abrogate a State's Eleventh Amendment immunity because, in such a case, Congress is not acting (at least in this case) under §5 to enforce a provision of the Fourteenth Amendment.

Hutto V. Finney distinguished.

Subsequent to *Edelman*, this Court held in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) that Congress has the power, when acting pursuant to §5 of the Fourteenth Amendment, to enact legislation authorizing federal courts to award attorney's fees against a State as a means of enforcing that Amendment's substantive guarantees. In so doing, however, the Court distinguished that case from *Edelman v. Jordan, supra*, when it stated that "[O]ur analysis [in Fitzpatrick] begins where *Edelman* ended, for in this Title VII case the 'threshold fact of congressional authorization,' 415 U.S., at 672, to sue the State as employer is clearly present." 427 U.S., at 452.

More recently, in *Hutto v. Finney*, 437 U.S. 678 (1978), an award of attorney's fees to be paid from funds of the State of Arkansas awarded by the Court of Appeals pursuant to the Fees Act, *supra*, was upheld by this Court. However, in *Hutto*, it was found that conditions in the Arkansas prison system

constituted cruel and unusual punishment in violation of the Eight and Fourteenth Amendments. The instant case is distinguishable from *Hutto* in that there was no finding of a deprivation of any of plaintiff's constitutional rights.

Moreover, this Court itself, in *Hutto*, distinguished that case from *Edelman v. Jordan, supra*, when it stated, *inter alia:*

> ". . . [F]inally, the claims asserted in *Employees* and in *Edelman v. Jordan* . . . were based on a statute rooted in Congress Art. I power . . . *Edelman v. Jordan, supra*, at 674 (underlying claim based on Social Security Act provisions dealing with aid to aged, blind, and disabled, 42 U.S.C. §§1381-1385). In this case, as in *Fitzpatrick v. Bitzer*, 427 U.S. 445, the claim is based upon a statute enacted to enforce the Fourteenth Amendment . . . ."
>
> 437 U.S., at 698 n. 31.

Edelman v. Jordan should be controlling in this case.

The factual situation in the present case is very similar to *Edelman* (except that it is an award of attorney's fees rather than retroactive welfare benefits which is at issue) in that it is an action brought by a recipient of public welfare benefits under 42 U.S.C. §1983 in which a constitutional claim has been combined with an underlying statutory claim based upon the Social Security Act. In *Edelman* the underlying claim dealt with aid to aged, blind, and disabled, 42 U.S.C. §§1381-1385, whereas in this action the claim deals with aid to families with dependent children (AFDC) 42 U.S.C. §601, *et seq*. It is submitted, therefore, that this case should be controlled by this Court's decision in *Edelman* and not by the decision in *Hutto v. Finney, supra*, since, in this case, as in *Edelman*, the plaintiff was not seeking to enforce any of her "civil rights" under the Fourteenth Amendment — she was merely challenging the disallowance of certain work-related expenses under the AFDC program.

The plaintiff's "civil rights" were not in issue in this case – the Fees Act is not applicable.

In *Edelman v. Jordan, supra*, merely because the action was brought under §1983 and an equal protection claim was combined with the underlying statutory claim, there is no indication therein that the Court viewed the action as one involving the enforcement of "civil rights."

Just recently in *Chapman v. Houston Welfare Rights Organization*, 47 U.S.L.W. 4528, (May 15, 1979), this Court, in discussing jurisdictional questions presented by that case, shed further light upon "civil rights" actions brought under §1983 when it stated, *inter alia:*

> ". . . [S]ection 1983, when properly invoked, satisfied the first requirement [that under 28 U.S.C. §1343(3) a civil action must be authorized by law]: it ensures that the suit will not be dismissed because not 'authorized by law: But it cannot satisfy the second, since by its terms, as well as its history, it does not provide any rights at all.
>
> "We reach a similar conclusion with respect to the argument that §1983 is a statute 'providing for the protection of civil rights, including the right to vote: Standing alone, §1983 clearly provides no protection for civil rights since, as we have just concluded, §1983 does not provide any substantive rights at all. To be sure, it may be argued that §1983, does in some sense 'provid[e] for the protection of civil rights' when it authorizes a cause of action based on the deprivation of civil rights guaranteed by other Acts of Congress. But in such cases, there is no question as to jurisdiction, and no need to invoke §1983 to meet the 'civil rights' requirement of §1343(4); the Act of Congress which is the actual substantive basis of the suit clearly suffices to meet the requisite test. It

is only when the underlying statute is *not* a civil rights act that §1983 need be invoked by those in claimants' position to support jurisdiction. *And in such cases, by hypothesis, §1983 does not provid[e] for the protection of civil rights.*"

47 U.S.L.W., at 4533 (emphasis added, footnote omitted).

The Court went on to state, *inter alia:*

"[T]he Social Security Act does not deal with the concept of 'equality' or with the guarantee of 'civil rights,' as those terms are commonly understood . . .
.

". . . the courts of appeals have consistently held that the Social Security Act is not a statute providing for 'civil rights' . . . . [W]e endorse those holdings, and find that a similar conclusion is warranted with respect to §1343(4) as well . . ." *Chapman v. Houston Welfare Rights Org., supra,* 47 U.S.L.W. at 4534.

It is true, of course, that unlike the plaintiffs in *Chapman, supra,* the plaintiff in this action *did* recite in her complaint, separate constitutional claims. (Set forth *supra,* at p. 4). But these "constitutional" claims are themselves based upon the provisions of the Social Security Act, and, were it not for the existence of §602(a)(7) of the Act, the recital of these "constitutional" claims would be meaningless.

Constitutional claims are customarily made to avoid jurisdictional problems.

It has become customary for a plaintiff in a case where the underlying claim is based on the Social Security Act, to set forth in the complaint at least one "equal protection" claim and/or one "due process" claim, and to recite that the action is

brought under 42 U.S.C. §1983. The complaint then proceeds to set forth the underlying Social Security Act "statutory" claim. Under the liberal "substantiality" test of *Hagans v. Lavine,* 415 U.S. 528, (1974), there is then little chance that the complaint will be susceptible to a motion to dismiss for a lack of federal court jurisdiction.

In *Chapman, supra,* Mr. Justice Stewart recently took note of this practice in a dissenting opinion when he observed:

> "[F]inally, even a welfare recipient with a federal statutory claim may sue in federal court if his lawyer can link this claim to a substantial constitutional contention. And under the standard of substantially established by *Hagans v. Lavine,* 415 U.S. 528, such a constitutional claim would not be hard to construct."
>
> 47 U.S.L.W., at 4548.

In *Edelman, supra,* this Court stated, *inter alia,:*

> "[I]t is of course true that *Rosado v. Wyman,* 397 U.S. 397 (1970), held that suits in federal court under §1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States. But it has not heretofore been suggested that §1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself . . . ."
>
> 415 U.S., at 676-677.

And, of course, this Court has held in *Maher v. Roe,* 432 U.S. 464 (1977), that there is no constitutional right to receive public welfare benefits.

The legislative history: the House Report v. the Senate Report.

The Court of Appeals pointed out that the House Report of the legislative history of the Fees Act "directly addressed the situation [present in this action where a] . . . plaintiff joins a constitutional claim with a non-fee statutory claim" and provided therein that, in cases where the non-constitutional claim is dispositive, ". . . attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' " *Appendix*, p. 7a.

The *Senate* Report, however, contains no such language, and, it is to be noted, it was the *Senate* Bill which was passed *in lieu of* the House Bill. *1977 U.S. Code Cong. & Adm. News*, p. 6338. Moreover, there is no indication in the *Senate* Report that Congress intended to treat welfare benefits cases brought under the Social Security Act as "civil rights" cases. The types of cases specifically mentioned in the Senate Report include cases involving racial discrimination, voting rights, public accommodation, housing discrimination, and discrimination in a private restaurant. There is no mention of cases brought to enforce claims to public welfare benefits under the Social Security Act.

But even if the Court of Appeals was correct in finding that Congress did intend, in the Fees Act, to award fees to the "prevailing party" in a case of this kind, wherein the underlying claim was based on the Social Security Act, the Fees Act would be ineffectual to abrogate the State's Eleventh Amendment immunity because, in such a case, Congress is not acting to enforce a provision of the Fourteenth Amendment. To the extent that Congress may have had such an intention, it was not a proper exercise of congressional authority under §5 of the Fourteenth Amendment.

If the petitioner's foregoing analysis is correct, and if this case is controlled by the decision in *Edelman v. Jordan, supra*, the District Court's award of attorney's fees to be paid out of funds of the State of Connecticut, is barred by the Eleventh Amendment. Certiorari should be granted to resolve this important constitutional question.

2. THE PORTION OF THE DECISION BELOW WHICH HOLDS THAT THE AWARD OF ATTORNEY'S FEES AGAINST THE STATE WAS A PERMISSIBLE "ANCILLARY EFFECT" OF A DECREE LIMITED TO PROSPECTIVE INJUNCTIVE RELIEF IS A MISINTERPRETATION OF THIS COURT'S OPINION IN *EDELMAN V. JORDAN*.

In *Edelman*, this Court explained that a court order limited to prospective injunctive relief may nevertheless require state officials to expend money from the state treasury in complying with such a decree; "[b]ut the fiscal consequences to state treasuries in these cases were *the necessary result of compliance with decrees which by their terms were prospective in nature* . . . . [s]uch an *ancillary effect* on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra*." 415 U.S., at 667-668 (emphasis added).

It is submitted that the award of attorney's fees entered by the district court in the present action does *not* come within this Court's careful definition, *supra*, of an "ancillary effect." The Second Circuit has extended this Court's "ancillary effect" doctrine to include a situation "when the award is incident to a judgment granting prospective relief." Appendix, p. 10a.

The Court of Appeals has noted in its opinion, Id., at n.4, that the circuits are divided on this issue with the First and Fourth in agreement with the Second; the Third and Sixth Circuits *contra*.

This conflict also justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 503, 701—August Term, 1978.

(Argued January 19, 1979 Decided March 9, 1979.)

Docket Nos. 78-7414, 78-7432

VIRGINIA GAGNE, individually,
and on behalf of all others similarly situated,

Plaintiff-Appellee-Cross-Appellant,

—against—

EDWARD W. MAHER, Commissioner of Social Services,

Defendant-Appellant.

Before:

WATERMAN, FEINBERG and VAN GRAAFEILAND,
Circuit Judges.

Appeal and cross-appeal from order of the United States District Court for the District of Connecticut, Chief Judge T. Emmet Clarie, awarding attorney's fees under Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

Affirmed in part, remanded in part.

EDMUND C. WALSH, Assistant Attorney General, Hartford, Connecticut (Carl R. Ajello, Attorney General, Paul M. Shapiro, Assistant Attorney General, Hartford, Connecticut, of Counsel), *for Defendant-Appellant.*

DAVID C. SHAW, Hartford, Connecticut (Legal Aid Society of Hartford County, Inc., Joan Pilver, Hartford, Connecticut, of Counsel), *for Plaintiff-Appellee-Cross-Appellant.*

FEINBERG, *Circuit Judge:*

This case raises interesting questions regarding application of the Civil Rights Attorney's Fees Awards Act of 1976 (Fees Act), which amended 42 U.S.C. § 1988. Defendant Edward W. Maher, Commissioner of Social Services of the State of Connecticut, appeals from an order of the United States District Court for the District of Connecticut, 455 F. Supp. 1344 (1978), Chief Judge T. Emmet Clarie, awarding attorneys' fees of $3,012.19 to the Legal Aid Society of Hartford County, Inc., the attorneys for plaintiff Virginia Gagne, to be paid by appellant Commissioner in his official capacity out of State funds.[1] The state asserts that the award of attorneys' fees in the circumstances of this case is not authorized by the Fees Act and, in any event, is barred by the Eleventh Amendment. Plaintiff cross-appeals, arguing that the award was too low. For reasons given below, we affirm the judgment of the district court on the State's appeal, and remand for further consideration on plaintiff's appeal.

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1 For this reason and for convenience, we frequently refer hereafter to appellant as the State.

I

Virginia Gagne, a working recipient of Aid to Families with Dependent Children (AFDC), commenced the underlying action that gave rise to the fee award in January 1975. On behalf of herself and others similarly situated, plaintiff alleged that Connecticut's policies and procedures for determining work-related expenses used in computing AFDC benefits violated the United States Constitution and the Social Security Act.

In the original complaint, plaintiff sought a declaratory judgment that Connecticut's regulations regarding maximum work-related transportation and lunch allowances contravened federal statutes and the United States Constitution, an injunction requiring defendant to take into account all reasonable work-related expenses in computing AFDC benefits and an order requiring defendant to notify affected class members of their right to reapply for benefits. In May 1975, while discovery was taking place in the action, defendant amended its regulations to provide expressly for deduction of all reasonable work-related expenses. In September 1976, plaintiff filed an amended complaint, alleging that the new policy as implemented still resulted in routine disallowance of expenses in excess of the standard allowances and that the State had not adopted reasonable procedures to notify AFDC recipients of their right to deduct work-related expenses. The parties negotiated a settlement in early 1977, and the district court entered a consent decree in March 1977. In this settlement defendant agreed to allow AFDC recipients to prove that they incurred work-related expenses in excess of standard allowances, to double the standard allowance for transportation expenses, to recompute the standard allowances annually using cost of living data and to

notify all working recipients of their rights with respect to the work-related expense deduction.

The district judge viewed the consent decree as a victory for plaintiff and held, over the objections of the State, that she was entitled to a fee award under the Fees Act. Finding that such an award against the State would not violate the Eleventh Amendment, the judge granted plaintiff's attorneys' fees of $3,012.19.

II

Before us, the State continues to oppose the fee to plaintiff's lawyers. We turn first to the question whether Congress intended to authorize an award of attorneys' fees in this situation. In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), the Supreme Court held that only Congress can authorize an exception to the usual American rule that attorneys' fees are usually not recoverable by the winning party in litigation in federal courts. Congress thereafter amended 42 U.S.C. § 1988 in the Fees Act, Pub. L. No. 94-559, 90 Stat. 2641 (1976), to permit a federal court to award attorneys' fees to a prevailing party in suits brought to enforce certain civil rights acts, among them 42 U.S.C. § 1983. The Fees Act provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow *the prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs. (Emphasis supplied.)

We explained the purpose of this Act in *Mid-Hudson Legal Services, Inc. v. G & U, Inc.*, 578 F.2d 34, 36 & n.2 (2d Cir. 1978):

> In order to encourage compliance with certain civil rights laws Congress has often authorized recovery of attorneys' fees by plaintiffs who, through their private suits under such statutes, act as private attorneys general by enforcing federal policy. E.g., Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612(c); the Equal Employment Amendments of 1972, 42 U.S.C § 2000e-16(b). In accordance with this approach, prior to *Alyeska* many federal courts had exercised their traditional equity powers to award attorneys' fees under the Reconstruction Civil Rights Acts .... The aim of § 1988, therefore, was to regain consistency in the application of fee shifting under the civil rights acts.

See also S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), reprinted in [1976] U.S. Code, Cong. & Ad. News 5908 (Senate Report).

The State contends that under the language of the Act quoted above, plaintiff is entitled to attorneys' fees only if she was the prevailing party on her constitutional claims, since the Fees Act does not authorize fees for successful claims under the Social Security Act. Appellant argues that Congress did not intend to authorize fee awards when plaintiff joins a constitutional claim with such a statutory claim and then the entire case is settled without a judicial determination that plaintiff had a meritorious constitutional claim. The State further argues

that plaintiff cannot be viewed as the prevailing party on any claim because she received very little of the relief requested, most of the terms of the consent decree did not change existing practices and any changes that were brought about by the consent decree would have been adopted by the State on its own initiative anyway.

Although the Fees Act and its legislative history do not specifically state that attorneys' fees are authorized in this precise situation, the statements of Congressional intent lead us to that conclusion. The Senate Report indicates that attorneys' fees should be awarded in a wide variety of situations, including consent judgments, and cites, among other authorities, *Kopet v. Esquire Realty Co.*, 523 F.2d 1005 (2d Cir. 1975).[2] In that case, 523 F.2d at 1008; and in *Blau v. Rayette-Faberge, Inc.*, 389 F.2d 469 (2d Cir. 1968), we indicated in analogous situations that counsel fees could be awarded whenever plaintiff's efforts confer benefits on the class, including those obtained through settlement. In addition, the House Report on the Fees Act directly addressed the situation in which plaintiff joins a constitutional claim with a non-fee statutory claim:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in [the Fees Act] with a

2 The Senate Report at 5, [1976] U.S. Code, Cong. & Ad. News at 5912-13 states:

> Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. *Kopet v. Esquire Realty Co.*, 523 F.2d 1005 (2d Cir. 1975), and cases cited therein; *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969); *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3d Cir. 1970); *Aspira of New York, Inc. v. Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975).

> claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees.... In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive.... In such cases, if the claim for which fees may be awarded meets the "substantiality" test, *see Hagans v. Lavine*, [415 U.S. 528 (1974)]; *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact."

H.R. Rep. No. 1558, 94th Cong., 2d Sess. at 4 n.7 (1976) (Citations omitted). See also *Kimbrough v. Arkansas Activities Association*, 574 F.2d 423 (8th Cir. 1978).

Given the legislative intent to authorize award of attorneys' fees to the prevailing party in settled cases and to avoid unnecessary decision of constitutional issues, we think it clear that Congress intended the test set forth in the House Report to govern the award of attorneys' fees in suits that are settled as well as in those that proceed to a judgment on a "non-fee" claim. The State's interpretation of legislative intent would encourage plaintiffs to try cases in which reasonable settlement offers have been received, merely to ensure a fee award. Cf. *Parker v. Matthews*, 411 F. Supp. 1059, 1062 (D. D.C. 1976), aff'd sub nom. *Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977). In view of the legislative history, we cannot attribute such an intent to Congress. Thus we conclude, that

once it has been determined that plaintiff obtained benefits for the class in the settlement on some claim, plaintiff is "the prevailing party" within the meaning of the statute. It does not matter which claim induced the concessions or which claim would have been successful at trial, as long as the constitutional claim is substantial and arises from the same operative facts as the non-fee claim.

Applying these standards here, we find that the prerequisites for an award of attorneys' fees have been met. Although the State argues that plaintiff did not prevail on any grounds, the district court found otherwise:

> The consent decree gave the plaintiff, as well as the class she represented, virtually all the relief sought in the complaint. Under the terms of the consent decree the defendant agreed to: permit working AFDC recipients to prove that they incur work-related expenses which are in excess of the standard allowance established by the defendant; conduct an annual review for the purpose of updating the standard allowances; publish heretofore unpublished standard allowances; double the standard transportation allowance from $.06 to $.12 per mile; provide written notice to working AFDC recipients of the precise amount of work-related expenses which are to be allowed as to each recipient; provide written notice of the AFDC recipients' right to an evidentiary hearing in the event that the recipient disagrees with the defendant's calculation of work-related expenses; and stay any reduction in AFDC benefits if the recipient requests an evidentiary hearing within ten days of receiving the aforesaid written notice.

455 F. Supp. at 1346. These findings are amply justified by the record, which also demonstrates that the State

changed its policies with great reluctance and only under the pressure of the lawsuit. Whether the court could have ordered the State to accept all the changes this lawsuit prompted it to make is irrelevant. The consent decree was the product of the litigation and plaintiff is entitled to use it to justify an award.

The district court, after noting that federal constitutional claims are "substantial" if they are sufficient to confer jurisdiction under the test of *Hagans v. Lavine*, 415 U.S. 528 (1974), found that plaintiff had raised several substantial constitutional claims that were properly pendent to the statutory claims. 455 F. Supp. at 1348. The court listed these constitutional claims as:

> whether an impermissible distinction had been created between those working welfare recipients whose work-related expenses were fully considered in the computation of AFDC awards and those whose work-related expenses were not fully considered, in violation of the equal protection clause; whether the defendant, by creating a table of standard allowances, which could not be challenged in individual cases, set up an irrebuttable presumption with respect to work-related expenses, in violation of the due process clause; and whether the failure to provide written notice of the opportunity for an evidentiary hearing, if the welfare recipient disputed the defendant's calculation of work-related expenses, violated the due process clause.

Id. We hold that the district court correctly found that plaintiff's constitutional claims were "substantial" under the relevant standard. Thus we conclude that on these facts Congress intended to authorize an award of fees to plaintiff's attorneys.

III

Appellant also argues that Congress did not have the power to authorize a fee award against a State in these circumstances. Although the Eleventh Amendment generally bars federal court awards of compensatory relief to be paid from a State treasury, see, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974), there are at least two exceptions to the Eleventh Amendment's general prohibition relevant here.[3] First, in interpreting the Eleventh Amendment, the Supreme Court has held that only retroactive monetary relief is prohibited, and that prospective relief against a State does not violate the Amendment even though it has a significant "ancillary effect on the state treasury." *Edelman v. Jordan*, supra, 415 U.S. at 667-68. This court has held that an award of attorneys' fees fits within the "ancillary effect" doctrine when the award is incident to a judgment granting prospective relief. *Fitzpatrick v. Bitzer*, 519 F.2d 559, 571-72 (2d Cir. 1975), affirmed in part, reversed in part, 427 U.S. 445 (1976); *Class v. Norton*, 505 F.2d 123, 126 (2d Cir. 1974); *Jordan v. Fusari*, 496 F.2d 646, 651 (2d Cir. 1974).[4] In addi-

3 See generally, Note, Attorneys' Fees and the Eleventh Amendment, 88 Harv. L. Rev. 1875, 1888-1902 (1975).

4 The circuits are divided on this issue with the First and Fourth Circuits in agreement with this Circuit. Compare *Souza v. Travisono*, 512 F.2d 1137, 1139-40 (1st Cir.), vacated and remanded, 423 U.S. 809 (1975) (for disposition after remand, see *Souza v. Southworth*, 564 F.2d 609 (1st Cir. 1977)); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1028-30 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975) and *Thonen v. Jenkins*, 517 F.2d 3, 7-8 (4th Cir. 1975) with *Skehan v. Board of Trustees*, 501 F.2d 31, 42 & n.7 (3d Cir. 1974), vacated and remanded, 421 U.S. 983 (1975), remanded, 538 F.2d 53 (1976) (en banc), cert. denied, 429 U.S. 979 (1976) and *Jordan v. Gilligan*, 500 F.2d 701, 705-10 (6th Cir. 1974), cert. denied, 421 U.S. 991 (1975). See also *Samuel v. University of Pittsburgh*, 538 F.2d 991, 999 (3d Cir. 1976); *Brandenburger v. Thompson*, 494 F.2d 885, 888 (9th Cir. 1974).

tion, the Supreme Court in a pre-*Edelman* summary decision, affirmed a three-judge court award of attorneys' fees against a state. *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), aff'd, 409 U.S. 942 (1972). In this circuit, summary holdings of the Supreme Court are binding precedent, *Doe v. Hodgson*, 500 F.2d 1206, 1207-08 (2d Cir. 1974), and we do not interpret subsequent Supreme Court decisions as overruling *Sims v. Amos*.[5] Thus, we adhere to our own precedents, which we believe are consistent with Supreme Court authority, and hold that the award of attorneys' fees in this case was a permitted "ancillary effect" of a proper prospective decree and therefore not barred by the Eleventh Amendment.

5 Although some courts have ruled that the affirmance in *Sims v. Amos* was implicitly overruled by *Edelman v. Jordan*, see *Jordan v. Gilligan*, *supra* note 4, 500 F.2d at 706-08; *Skehan v. Board of Trustees*, *supra* note 4, 501 F.2d at 42 & n.7; but see *Bond v. Stanton*, 528 F.2d 688, 691-92 (7th Cir. 1976), remanded, 429 U.S. 973 (1977), fee award reinstated on basis of Fees Act, 555 F.2d 172 (7th Cir. 1977), cert. denied, 46 U.S.L.W. 3803 (July 3, 1978), we think that recent Supreme Court actions indicate at most that the Court still considers the question an open one. In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 269 n.44 (1975), the Court stated that "an award [of attorneys' fees] against a state government would raise a question with respect to its permissibility under the Eleventh Amendment, a question on which the lower courts are divided," but the Court expressly declined to comment on the issue. The Court included in its list of conflicting lower court decisions the three-judge court ruling in *Sims v. Amos*, *supra*. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), affirming this court's award of attorneys' fees, 519 F.2d at 571-72, the Court said it did not have to reach the issue whether we had correctly applied the "ancillary effect" doctrine, because the award in that case was justified by Congress' exercise of its power under the Fourteenth Amendment, 427 U.S. at 456-57. Most recently, the Court held in *Hutto v. Finney*, 46 U.S.L.W. 4817, 4820 (June 23, 1978), that an award of fees against a state defendant that had acted in bad faith was a proper exercise of the district court's power to enforce its prospective judgment and thus was permitted under the "ancillary effect" doctrine.

Another exception to the Eleventh Amendment's protection of State treasuries is an award authorized by Congress pursuant to section 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In *Hutto v. Finney*, supra note 5, 46 U.S.L.W. at 4821, the Supreme Court ruled that "Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment," and that "[w]hen it passed the [Fees] Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States."[6] The State contends, however, that Congress' power under the Fourteenth Amendment to override state sovereign immunity extends only to suits in which a party prevails on a *constitutional* claim. On this view, Congress cannot validly authorize a fee award against a state in the absence of a judicial determination that plaintiff had a meritorious constitutional claim. We disagree. We think it is within Congress' Fourteenth Amendment power to authorize a fee award when a party prevails on a statutory claim as long as the pendant constitutional claim is a substantial one and arises out of the same operative facts. Such a fee award furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues. As we understand the Supreme Court decisions, any appropriate means of implementing the Fourteenth Amendment overrides the State's Eleventh Amendment rights, see, e.g., *Fitzpatrick v. Bitzer*, supra, 427 U.S. at 453, 456; *Katzenbach v. Morgan*, 384 U.S. 641, 648-50 (1966). We hold that the authorization of attorneys' fees to be awarded under the standards set

6 See also *Morrow v. Dillard*, 580 F.2d 1284, 1296-1301 (5th Cir. 1978); *Gates v. Collier*, 559 F.2d 241 (5th Cir. 1977).

forth above is an appropriate way to achieve the competing goals described above. See *Lund v. Affleck*, 587 F.2d 75, 76-77 (1st Cir. 1978); *Bond v. Stanton*, 555 F.2d 172, 174-75 (7th Cir. 1977), cert. denied, 46 U.S.L.W. 3803 (July 3, 1978); *Southeast Legal Defense Group v. Adams*, 436 F. Supp. 891, 893-95 (D. Ore. 1977).

In sum, we find that the Eleventh Amendment does not bar the fee award here, that the district judge correctly interpreted the Fees Act and that the State's arguments in opposition to the award to plaintiff's attorneys are without merit.[7]

IV

We turn now to the cross-appeal, in which plaintiff argues that the district judge abused his discretion by awarding attorneys' fees that were much too low. The fee affidavits stated that plaintiff's two attorneys worked almost 250 hours on the case, of which 58 hours represented time spent on the fee application. If all these hours had been compensated at the customary rate, plaintiff's lawyers would have received over $11,000. The district judge, however, awarded them only $3,012.19. He first determined, on the basis of affidavits regarding cus-

7 The State also argues that plaintiff cannot be considered the prevailing party because she unsuccessfully asserted her claim that she was wrongfully deprived of work-related expense deductions in a state administrative hearing, and thus she is bound by res judicata. However, the State did not make this argument in the district court and it is precluded from raising this new issue on appeal. See *United States v. Friedland*, 391 F.2d 378, 381-82 (2d Cir. 1968), 441 F.2d 855 (2d Cir.), cert. denied, 404 U.S. 867, 914 (1971). In addition, we conclude that this case is not a proper one for application of res judicata, since the State has not established that the identical issues raised in the federal action were litigated in the state administrative proceeding. See *McNellis v. First Federal Savings & Loan Ass'n*, 364 F.2d 251, 257 & n.8 (2d Cir.), cert. denied, 385 U.S. 970 (1966).

tomary rates, that a fee of $45.00 an hour was justified. The judge then refused to award any fee for the 58 hours spent on the fee application, disallowed fees for one-half of the remaining time and further reduced the award by 30 percent on the ground that the program employing plaintiff's counsel receives funding under Title XX of the Social Security Act, 42 U.S.C. § 1397 et seq. Plaintiff argues that the district judge abused his discretion in each instance.

The issue whether plaintiff's attorneys can recover fees for services performed in connection with the fee application is an important one, since the question is bound to recur in applications based upon the Fees Act. Chief Judge Clarie apparently felt compelled to disregard the time so spent, since he observed:

> Before applying this rate to the number of hours claimed by Pilver and Shaw, it is *necessary* to subtract the number of hours which were devoted to seeking an award of attorneys' fees, because those hours were spent solely for the attorneys' benefit and did not benefit the plaintiffs. (Emphasis supplied.)

455 F. Supp. at 1349. The issue has arisen in at least two circuit courts of appeals recently, and both have ruled that such time is compensable. See *Lund v. Affleck*, supra, 587 F.2d at 77; *Prandini v. National Tea Co.*, 585 F.2d 47, 52-54 (3d Cir. 1978). There is apparently no controlling authority in this circuit. In *Torres v. Sachs*, 538 F.2d 10 (2d Cir. 1976), which involved an analogous statute, a panel of this court affirmed an award of attorneys' fees that included compensation for time spent on the fee application. See *Torres v. Sachs*, 69 F.R.D. 343, 348 & n.2 (S.D.N.Y. 1975). The panel did so, however, without discussion of the issue.

The question is thus technically open in this court, and we believe there are strong reasons for adopting the approach of the First and Third Circuits. We agree with Judge Garth's statement in *Prandini*, supra, that:

> If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased. . . . Such a result would not comport with the purpose behind most statutory fee authorizations, *viz*, the encouragement of attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies.

585 F.2d at 53. In a decision upon which *Lund v. Affleck*, supra, relied, the First Circuit pointed out that

> [t]o hold otherwise would permit a deep pocket losing party to dissipate the incentive provided by an award through recalcitrance and automatic appeals.

Souza v. Southworth, 564 F.2d 609, 614 (1st Cir. 1977). This observation seems particularly apt in this case, where the State's lawyers on this appeal have devoted the substantial time required to produce over 60 pages of briefs and to make the trip to this court from Hartford, Connecticut, in order to overturn an award of some $3,000. Moreover, the legislative history of the Fees Act impliedly supports this view since the Senate Report cited with approval[8] a district court decision which held that denying attorneys' fees for time spent in obtaining them would "dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to

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8 Senate Report at 6, [1976] U.S. Code, Cong. & Ad. News at 5913.

gain any fees." *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 683-84 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 547 (1978).

Oddly enough, the State's briefs in this court largely ignore the issues raised by plaintiff's cross-appeal. The State contents itself with a one-paragraph reference to *Lund v. Affleck*, supra, and a quotation from *King v. Greenblatt*, 560 F.2d 1024, 1026 (1st Cir. 1977), cert. denied, 46 U.S.L.W. 3803 (July 3, 1978), that "[w]hat constitutes a reasonable attorney's fee in a particular case shall rest within the sound discretion of the district court." We have no quarrel with that estimable proposition, but the district judge here obviously thought he could not exercise his discretion in evaluating the proper fee for the 58 hours plaintiff's attorneys spent on the fee application. That erroneous view was premised primarily upon two cases where attorneys' fees were based upon the equitable common fund doctrine rather than upon the statutory authorization we have here.[9] Unlike those cases, there is here no potential or actual conflict of interest between counsel seeking attorneys' fees and the persons they represent, since all payments will come from the defendant and will not affect the clients' recovery. See *Prandini v. National Tea Co.*, supra, 585 F.2d at 52-53.[10]

We therefore hold that the district court erred in its constricted view of its own discretion. The judge should have evaluated the worth of the 58 hours excluded from

9 The district judge cited *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1102 (2d Cir. 1977), amended, 575 F.2d 1009 (2d Cir. 1978) and *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 111 (3d Cir. 1976).

10 *Prandini* also apparently overruled *Commonwealth of Pennsylvania v. O'Neill*, 431 F. Supp. 700, 705 (E.D. Pa. 1977), aff'd, 573 F.2d 1301 (3d Cir. 1978), the other case relied on by Chief Judge Clarie.

consideration, since time reasonably spent by plaintiff's attorneys in establishing their fee would be compensable. The exercise of discretion, however, gives the district judge great leeway. If the fee claims are exorbitant or the time devoted to presenting them is unnecessarily high, the judge may refuse further compensation or grant it sparingly. See *Lund v. Affleck*, supra, 587 F.2d at 77. We leave these matters in the first instance to the district court.

Plaintiff's remaining arguments on the cross-appeal require less extended discussion. We do not think it was error for the district court, "in exercising its discretion," to reduce the fee award "to reflect the public contribution of federal funds to the plaintiff's attorneys." 455 F. Supp. at 1349. The court reduced the fee award by 30 percent after finding approximately 30 percent of the Legal Aid Society's funding during the years in which the lawsuit was pending came from Connecticut's program under Title XX of the Social Security Act. Although such a reduction is not mandatory and we do not suggest that it be routinely done, see *Mid-Hudson Legal Services, Inc. v. G. & U, Inc.*, 578 F.2d 34 (2d Cir. 1978), the issue is committed to the sound discretion of the district court. Cf. *EEOC v. Enterprise Association Steamfitters Local 638*, 542 F.2d 579, 593 & n.13 (2d Cir. 1976), cert. denied, 430 U.S. 911 (1977). Plaintiff argues that the reduction here was an abuse of discretion because under the funding program it receives reimbursement for services to particular clients but no application was submitted in connection with this lawsuit.[11] We conclude that it was not an abuse of discre-

11 The Legal Aid Society states that it receives federal reimbursement of the cost of 75 percent of the services it performs for eligible clients, and that it never applied for reimbursement for services to Virginia Gagne and her class because it undertook representation in this matter prior to enactment of Title XX.

tion for the district court to tie the reduction in the fee to the overall percentage of federal funding received by the Legal Aid Society during the years of litigation rather than the funding for the particular case.

Finally, we think that the district court did not commit error in disallowing one-half of the hours worked because "the issues involved in the case were relatively simple and most attorneys would not have spent so many hours on the case." 455 F. Supp. at 1349. We recognize that our cases require that "in increasing or decreasing an attorney's compensation, the district judge should set forth as specifically as possible the facts that support his conclusion," *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 169 (2d Cir. 1973) quoted in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 473 (2d Cir. 1974). Nevertheless, under the circumstances we conclude that the court's brief explanation satisfies this requirement. We note that the district court did compare the fee in this case with that awarded in at least one other recent case. 455 F. Supp. at 1349.

In conclusion: On the State's appeal, we affirm the judgment of the district court. On the cross-appeal, we remand for further consideration of the question whether the fee award should be increased to compensate plaintiff's attorneys for their efforts in establishing their right to a reasonable fee.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Ninth day of March, One thousand nine hundred and seventy-nine.

Present:

HON. STERRY R. WATERMAN
HON. WILFRED FEINBERG
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges,

VIRGINIA GAGNE, Individually and on behalf of all others similarly situated,
Plaintiff-Appellee Cross-Appellant.

v. 78-7414
78-7432

EDWARD MAHER, Commissioner of Social Services, Successor to Nicholas Norton, individually and as Commissioner of Welfare, State of Connecticut and Henry Boyle, individually and as Acting Deputy Commissioner of Welfare,
Defendant-Appellant Cross-Appellee.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in part and remanded in part in accordance with the opinion of this court, with costs to be taxed against the defendant-appellant cross-appellee Maher.

A. DANIEL FUSARO,
Clerk

By:
ARTHUR HELLER,
Deputy Clerk

A true copy,

A. DANIEL FUSARO,
Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

VIRGINIA GAGNE, individually, and on behalf of all others similarly situated,

Civil No. H75-1

Plaintiff

vs.

EDWARD MAHER, ET AL.

Defendants.

CONSENT DECREE

It is hereby ordered this Second day of March, 1977, that:

1. Judgment may enter in accordance with the provisions of this agreement. Nothing in this Consent Decree is intended to constitute an admission of fault by either party to this action.

2. In determining the availability of income and resources for working AFDC recipients, the defendants agree that they shall take into consideration any expenses reasonably attributable to the earning of income.

3. The defendants agree to publish the heretofore unpublished current day care expense standards. Any other unpublished standard allowance or allowances used by the Department for work-related expenses shall be based upon an evaluation of current prices available in the locality in which the recipient requesting the allowance resides.

4. The defendants agree that any standard allowance or allowances established by the Department, whether published or unpublished, for specific items of expense which are reason-

ably attributable to the earning of income, are not maximum amounts allowed. Working AFDC recipients will be allowed to prove that they incur expenses which are reasonably attributable to the earning of income which are in excess of, or different from, the Department's standard allowance, and upon presentation of such proof to the Department, such actually incurred expense will be allowed.

5. The defendants agree that all standard allowances established by the Department for expenses which are reasonably attributable to the earning of income, by AFDC recipients shall be reviewed annually to determine the currency of their relationship to the cost of living. In the annual report, required by §17-2 of the Connecticut General Statutes, in which the Commissioner of Social Services is required to at least annually compute a redetermination and such revisions to all components of the standards of need for the several programs administered by the Department so as to reflect changes in living costs using the current federal Regional Consumer Price Index, a current computation for all work-related expense standards will be separately included. Where such standards are found to be not reasonably priced, the Commissioner shall so inform the appropriate committee of the General Assembly.

6. The class of persons the plaintiff is seeking to represent shall be certified to include all AFDC recipients in the State of Connecticut who have or claim to have expenses which are reasonably attributable to the earning of income.

7. The defendant agrees that the work-related transportation allowance specified at Connecticut Department of Social Services Policy Manual, Volume I, Chapter III at Index 332.31, 2b(2) and (3) shall be increased, from $.06 per mile to $.12 per mile.

8. The defendant shall automatically increase the aforesaid transportation allowance for all working AFDC recipients who incur the work-related transportation expense

listed in said Policy Manual in Index 332.31, 2b(2) and (3), effective March 1, 1977. It shall be implemented as follows:

(a) For all new applicants, after March 1, 1977, the $.12 per mile allowance will be granted immediately.

(b) For currently employed AFDC recipients who are now receiving the $.06 per mile allowance, the increased allowance will be implemented at the time of such recipient's next scheduled or unscheduled case review whichever occurs first, but in no event later than June 1, 1977. A retroactive adjustment to March 1, 1977, will be made for such a recipient by issuing to him or her a separate check in the amount of $.06 a mile or such other greater amount per mile as the recipient was found to be entitled for each mile of travel, from March 1, 1977, to the date of such case review.

9. The Department of Social Services shall mail the Notice attached to this stipulation as exhibit "A" to all AFDC recipients no later than April 1, 1977, and this form will also be mailed to each recipient who is working or is planning to become employed before any and all scheduled face-to-face interviews.

10. At each face-to-face interview, the interviewing worker shall clearly advise each working welfare recipient, that, in determining the availability of income and resources, for purposes of computing the recipient's award, income equal to expenses reasonably attributable to the earnings of income will *not* be included as income to such recipient and will be disregarded by the Department. The interviewing worker will further explain that, although the Department of Social Services has adopted certain standard allowances, recipients may claim expenses greater than or different from those standards if

it can be demonstrated that such expenses are reasonably attributable to the earning of income.

11. After each face-to-face interview, the notice attached hereto as exhibit "B" shall be completed and mailed to the recipient. This notice shall be in addition to and not in lieu of any other notice heretofore required by law.

12. If the working AFDC recipient disagrees with the kind and/or amount of work-related expense allowances allowed, or the computation thereof, he or she may request a fair hearing to challenge the Department's decision. Any decision that would result in the suspension, reduction or discontinuance of public assistance shall be stayed if any evidentiary hearing is requested in writing by the recipient and returned to the Department within ten days of the date of notice.

13. The Department shall modify its regulations and policy to the extent necessary to make them consistent with this stipulation.

14. All notices required by this stipulation shall be printed in both English and Spanish.

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SO ORDERED:

T. EMMET CLARIE, CHIEF
United States District Judge